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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 496

M. E. HEISER,
Petitioner,

vs.

WILLIE MAE WOODRUFF, HOWARD L. WOODRUFF, MARGUERITE B. WOODRUFF, LEONARD J. WOODRUFF, JR., IDA BELL WOODRUFF, AND LEONARD J. WOODRUFF,
Respondents.

BRIEF OF RESPONDENTS ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF RESPONDENTS ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF CASE

Respondents do not agree with the petitioner's statement of the case, and find it necessary to make their own statement.

On August 9, 1928, the petitioner had shipped to him from San Francisco to Los Angeles, California, by barge

thirty-six sacks of corundum (ore) weighing 4325 pounds and then valued at $500.00 (R. Vol. 2, p. 1117). This shipment is identified in the record by the deposition of the petitioner as the same material or merchandise for which he later recovered the judgment hereinafter referred to (R. Vol. 2, p. 801-3-820-850-1).

On Feb. 19, 1930, the petitioner filed a claim in the matter of the Bankruptcy of the Golden State Item Company in the United States District Court for the Southern District of California, for the same material or merchandise then valued at $30,250.00 (R. Vol. 2, p. 1188). This claim was disallowed (R. Vol. 2, p. 1187), and an appeal prosecuted to the District Court and the appeal dismissed (R. Vol. 2, p. 1187).

On May 11, 1932, petitioner sued the bankrupt, Leonard J. Woodruff, and others in the District Court of the United States for the Southern District of California, Central Division, in Case No. 5587-J for the alleged conversion of the same material and merchandise which he then valued in his complaint at $164,000.00 (R. Vol. 2, p. 1040-3). The case was dismissed for want of prosecution on June 12, 1933 (R. Vol. 2, p. 1043-6).

On June 11, 1935, and after his first case had been dismissed for want of prosecution, petitioner re-filed the case in the same Court where it was docketed as 7256-C. (R. Vol. 1, p. 45). Service of summons was obtained upon the bankrupt on the 31st day of January, 1939, by leaving the

summons at his residence with a minor son (R. Vol. 1, p. 215). The bankrupt was away from home at the time of this service and did not return until after his default was entered (R. Vol. 1, p. 618). Judgment was entered on March 20, 1939 (R. Vol. 1, p. 10). The petitioner was the only witness who testified at the time that the judgment was entered (R. Vol. 2, p. 650).

On the 9th day after the entry of this judgment the bankrupt served his notice of motion to set aside the default and the default judgment (R. Vol. 1; p. 219).

It is stated on page 8 of the petitioner's brief and in brief in support of petition for writ of certiorari that bankrupt "moved to vacate judgment on the ground (among others) that it had been procured by fraud and perjury as to values of the gems the Court had found in his judgment, Woodruff had defrauded Heiser of." Respondents respectfully challenge this statement. The record shows that the grounds upon which the bankrupt moved to vacate the default and the default judgment were: (1) that said default and default judgment were entered prematurely and without authority of law; (2) that they were entered through surprise, inadvertence, mistake and excusable neglect in that he was not actually notified that his son was served with process in the case until after default judgment was entered; (3) that where process is not personally served on defendant, the Court may allow defendant where justice

demands to answer to the merits of the original action (R. Vol. 1, p. 219-20).

It is respectfully submitted that nowhere in this motion was the charge made that the judgment was procured by fraud and perjury as to the value of the gems which the petitioner claims to have owned.

This motion was denied (R. Vol. 1, p. 263-6).

The parties then stipulated that the Court should hear evidence to determine the value of the property which the petitioner claimed to have lost. The record does not disclose why the petitioner entered into this stipulation, but it would seem apparent from the record that this was done because the Court evidently did not hear any evidence as to the value of the property at the time that judgment by default was rendered. The stipulation specifically provided that "the issues at such hearing to be limited to ascertaining by the Judge of said Court, from such evidence to be presented by the said parties under the rules of evidence of said Court, the sum or amount of damage that may represent the value of the said property of plaintiff for which damages were allowed in the said judgment" (R. Vol. 1, p. 265).

The petitioner, contending that he was possessed of certain property of which he had been defrauded, or which had been wrongfully converted, at the hearing in pursuance of this stipulation, which was had on June 19, 22, 23, 27, 28, 1939 (R. Vol. 2, p. 1120), proceeded to endeavor to establish

the value of something which he claimed was in existence and of which he had at one time the title and possession, but which was not then in existence so far as petitioner was concerned. To do this the petitioner brought into Court what he claimed were sapphires, zircons, and opals of like quality to those which he had had in 1928, 11 years before, and sought to establish the value of the stones which he brought into Court upon the theory and basis that his property was of like quality and value (R. Vol. 2, p. 1163-4). The question of his ownership and possession of this property in 1928 was specifically excluded from the hearing (R. Vol. 1, p. 265). After hearing the evidence as to the value based upon the assumption of the existence, ownership and possession of material and merchandise of like quality to that exhibited in Court, the Court permitted the judgment to stand in amount.

(The respondents upon the hearing before the Referee contended and established that the petitioner never at any time owned, nor possessed the semi-precious stones for the loss of which he recovered judgment and that for this reason his claim is clearly without merit and does not represent a real debt.)

On July 5, 1939, an adjudication of bankruptcy was entered by the United States Court for the Eastern District. Since that time the following cases have been adjudicated

by the Circuit Courts of Appeals of the Ninth and Tenth Circuits, arising out of this bankruptcy matter:

M. E. Heiser vs. *Leonard Woodruff*, a bankrupt (10th Cir.), 112 Fed. 2d 652;

Jackson vs. *Heiser* (9th Cir.), 111 Fed. 2d 310;

Jackson vs. *Lynch* (9th Cir.), 111 Fed. 2d 1003;

In Re Woodruff (9th Cir.), 121 Fed. 2d 152;

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Willie Mae Woodruff et al vs. *M. E. Heiser* (10th Cir.), 150 Fed. 2d 869 (this case).

After the adjudication in bankruptcy respondents and the Trustee advised the Referee in Oklahoma that in their opinion the judgment underlying petitioner's claim was erroneous, unjust and void, and that the Trustee should be directed to proceed to ascertain whether said judgment was subject to the criticism directed against it (R. Vol. 1, p. 20).

In connection with this proceeding the petitioner says, on page 8 of his brief that the respondents "filed a written petition before the Referee alleging that the California judgment was obtained by fraud and perjury and asking the Referee in Oklahoma to authorize and instruct the Trustee to go to California and attack the judgment." Respondents respectfully challenge this statement and submit

that their application filed before the Referee contained no such allegations as to fraud and perjury (R. Vol. 1, p. 20).

In response to the authority granted him by Referee, the Trustee employed counsel in California and filed in the case in which the judgment was rendered in the United States District Court for the Southern District of California, Central Division, his "notice of motion to vacate judgment, to set aside default, to vacate orders entered after judgment, to permit the filing of an answer by, and on behalf of Leonard J. Woodruff, to permit the filing of an answer by P. M. Jackson, Trustee, in bankruptcy for Leonard J. Woodruff and to allow the Trustee in bankruptcy to intervene" (R. Vol. 1, p. 275).

In connection with the contents of this motion petitioner states on page 9 of his brief, "The Trustee, Jackson, joined by the bankrupt, Woodruff, then filed in the California District Court charging fraud in procurement of the judgment, perjury as to the value of the gems converted by Woodruff, and many other grounds set up in the pleadings and affidavits." The respondents respectfully challenge this statement, and submit to the Court that the grounds upon which the Trustee sought permission to intervene and asked that the judgment be vacated and set aside and that he be permitted to file an answer and be heard upon the merits, appearing at page 275-278 of Vol. 1 of the record herein, contain no allegations of fraud in procurement of the judgment or perjury as to the value of the gems allegedly

converted. There is in this notice the following statement: "Said motion will be made upon the ground that a fraud was practiced upon the above entitled Court with respect to the entry of said judgment." The character of the fraud thus alleged to have been practiced upon the Court with respect to the entry of the judgment and not its procurement is not further specified in the record and, inasmuch as the Trustee was never granted permission to intervene in the action and never became a party to it, as is hereinafter set out, there was no effort to prove the character of fraud in the entry of the judgment which the Trustee had specified in his notice, but it is pointed out that fraud in the entry of the judgment has no reference to fraud in the obtaining of the judgment nor perjury as to the value of the gems allegedly converted.

The motion of the Trustee was heard, as noticed. The proceedings incident thereto will be set out more in detail in our brief. Suffice now that the Trustee was not permitted to intervene in the action in which the judgment was rendered and never became a party thereto.

The Trustee then appealed to the Circuit Court of Appeals of the Ninth Circuit and the action of the District Court in denying his motion for permission to intervene was affirmed.

In the meantime the petitioner had filed his claim in the bankruptcy proceeding in Oklahoma based on his judgment (R. Vol. 1, p. 8), and later a supplement to his claim

after the Circuit Court of Appeals for the Ninth Circuit had affirmed the order of the California District Court denying the Trustee permission to intervene in the case out there in which the judgment was rendered.

Bankrupt then filed in the bankruptcy proceeding his petition for an arrangement of his debt and for a stay of administration in bankruptcy pending the determination of such petition. On August 26, 1940 (R. Vol. 1, p. 29) the Referee granted a stay of proceedings, directed filing of objections to claims and ordered that all claims should be on contests between creditors and at their expense.

Certain creditors of the bankrupt, including the respondents, then filed their objections to the allowance of petitioner's claim in bankruptcy (R. Vol. 1, p. 41), and amendment thereto (R. Vol. 1, p. 122). With respect to the allegations and contents of the objections to the Heiser claim before the Referee and without citation of record, petitioner, on page 9 of his brief, makes this statement:

> "After the judgment so became final, the same identical charges, in the same words and identical word phrases appearing in the affidavits and pleadings were filed as objections to the allowance of the Heiser judgment as a filed claim before the Oklahoma Referee."

The respondents respectfully challenge this statement. An analysis of the contents of the objections filed to the allowance of the Heiser claim before the Referee in Bankruptcy will disclose that there for the first time in any pro-

ceeding, either before the California Courts, or the Bankruptcy Court in Oklahoma, it was charged and alleged that the judgment underlying the claim was obtained by perjured testimony, did not represent a real debt and was without merit (R. Vol. 1, p. 20). The Circuit Court of Appeals recognized this to be the state of the record and the facts in the case in the majority opinion from which the following is quoted:

> "But the grounds of contest did not end there. It was specifically charged in the objections that at the time of the filing of the suit in California and at the time of the rendition of the judgment, Woodruff was not indebted to Heiser in any amount; that the material allegations contained in the complaint were untrue; that the judgment was obtained through the use of perjured testimony given by Heiser; and that he thus committed a fraud upon the court and the parties. The record fails to indicate that these matters were placed before the court in California, either in the motion of the defendant Woodruff to vacate the judgment, by the motion of the trustee and the defendant Woodruff to set aside the judgment, or otherwise. Therefore the judgment did not constitute res judicata in respect to these issues, and the claim was open to attack on these grounds. *Pepper* vs. *Litton*, supra. In reaching this conclusion we are mindful of the statement in *Jackson* vs. *Heiser*; supra, that the charge of fraud in obtaining the judgment was denied, not proved, and apparently abandoned. But the nature of the fraud referred to does not appear. And the record before us does not contain any showing that the contention that the material allegations in the complaint were knowingly false, that the judgment was secured through the use of perjured testimony given by Heiser, and that a fraud thus was committed to the

> court in California by motion to vacate the judgment or otherwise, or that such issues were ever expressly adjudicated by that court in favor of Heiser."

The matter was heard by the Referee in Bankruptcy upon the merits of the objections urged to the Heiser claim. Much evidence was introduced and the hearing proceeded over a considerable period of time.

The Referee in Bankruptcy in Oklahoma is the only Court that has heard, or considered the evidence produced by the respondents in opposition to the claim of the petitioner and upon hearing this evidence he denied the claim in toto. On review the District Court, feeling that the Referee was without jurisdiction to inquire into the merits of the claim to ascertain whether or not it was founded upon a real debt and was meritorious, reversed the Referee without making findings of fact and conclusions of law and allowed the claim in full. Respondents then appealed to the Circuit Court of Appeals which Court reversed the District Court.

SUMMARY OF ARGUMENT

Point I.

The Bankruptcy Court, being a Court of exclusive jurisdiction in bankruptcy matters has the power, authority and jurisdiction to inquire into the merits of a judgment underlying a claim filed in a bankruptcy proceeding for the purpose of determining whether the claim represents a real debt and is founded upon merit.

Point II.

A court of equity has jurisdiction to tie the hands of a wrong-doing judgment creditor so as to prevent him from profiting by his wrong.

Point III.

The proceedings on behalf of the Trustee in the California Courts are not res judicata of the objections urged to petitioner's claim before the Bankruptcy Court and did not bar or estop that Court from exercising its equitable jurisdiction and powers herein.

Point IV.

By acquiescing in the order of August 26, 1940, staying proceedings in bankruptcy, filing objections to claims and participating in hearings thereon before the Referee in Bankruptcy, petitioner submitted to the jurisdiction of Bankruptcy Court and is now estopped to question that jurisdiction.

Point V.

This case, being here for all purposes, respondents ask this Court to consider and affirm the order of the Referee disallowing petitioner's claim.

ARGUMENT

Point I.

The Bankruptcy Court, being a Court of exclusive jurisdiction in bankruptcy matters, and essentially a court of equity, has the power, authority and jurisdiction to inquire into the merits of the judgment underlying appellee's claim for the purpose of determining whether said claim is founded upon a real debt and is meritorious; also whether it should be (1) allowed in whole or in part, (2) disallowed or, (3) subordinated to the claims of other creditors.

The Bankruptcy Court is a Court of exclusive jurisdiction:

United States Fidelity & Guaranty Co. vs. *Bray*, 225 U. S. 205, 56 L. Ed. 1055;

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Beneficial Loan Co. vs. *Noble* (10th Cir.), 129 Fed. 2d 425;

Hansen vs. *Wengren* (10th Cir.), 121 Fed. 2d 1011.

It is essentially a court of equity and its proceedings inherently proceedings in equity. Authorities cited and *Prudence Realization Corporation* vs. *Geist*, 316 U. S. 89, 86 L. Ed. 1293.

The jurisdiction of Bankruptcy Courts is exclusive of all other courts with respect to the allowance and disallowance of claims. Authorities cited.

This exclusive jurisdiction gives Bankruptcy Courts the power to inquire into the validity of any claim asserted

against the estate and to disallow it if it is ascertained to be without lawful existence. *Lesser* vs. *Gray*, 236 U. S. 70, 59 L. Ed. 471; *Pepper* vs. *Litton*, supra.

Bankruptcy Courts have exercised equitable powers in passing on a wide range of problems arising out of the administration of bankrupt estates. They have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done. These equitable considerations are exercised in the allowance or disallowance of claims. *Pepper* vs. *Litton*, *Beneficial Loan Co.* vs. *Noble*, supra.

The fact that debt or claim has been reduced to judgment does not affect its character so far as provability in bankruptcy is concerned.

Boynton vs. *Ball*, 121 U. S. 457, 30 L. Ed. 985;

Pepper vs. *Litton*, supra;

In Re James A. Brady Foundry Co. (7th Cir.), 3 Fed. 2d 437;

In Re Continental Engine Co. (7th Cir.), 234 Fed. 58;

Butzel vs. *Webster Apt. Co.* (6th Cir.), 112 Fed. 2d 362;

In Re Avery (6th Cir.), 114 Fed. 2d 768;

Chandler vs. *Thompson* (7th Cir.), 120 Fed. 940;

In Re Thompson (D. C.), 276 Fed. 313;

Local Loan Co. vs. *Hunt*, supra;

Letcher County vs. *De Foe* (6th Cir.), 151 Fed. 2d 987.

A note, invalid because given without consideration, does not become valid because reduced to judgment by default. A check given for a gambling debt and unlawful, is not made lawful by reduction to judgment. The character of the debt or obligation is not changed by its merger into a judgment.

If it were otherwise, the Bankruptcy Court would not have exclusive jurisdiction over claims filed with it. If it were bound by judgments of other courts its hands would be tied. It could not exercise its equitable powers in the marshaling and distribution of the assets of the estate.

Let us assume that default judgment is rendered in an action for conversion of two automobiles. Bankruptcy then intervenes, claim is filed based upon judgment and objections filed thereto. The Trustee or creditors are able to establish by undisputed proof, (as here) that claimant did not own but one of the automobiles; never had title to or possession of the other car and had parted with title to the first one, the value of which was materially less than the amount of the judgment. Would the Bankruptcy Court be precluded by the judgment from inquiring into the merits of the claim simply because of the judgment? Creditors earnestly submit that the answer must be "No". The posed facts fit this case. The undisputed evidence shows that petitioner never possessed the several thousand ounces of commercial stones for which he obtained judgment; the material placed in the bank at Los Angeles was corundum

or ore of inconsequential value and he parted with the title to this property for value before he went to Europe. The inherent equity jurisdiction of the Bankruptcy Court rebels at fraud, chicanery, perjury. Here is a shocking example of such dealings. Equity will not permit technical considerations to give life and form to such misgivings and the perpetrator thereof to profit thereby at the expense of others who were strangers to the entire transaction.

The Referee disallowed the claim in toto. The order of disallowance carries with it a presumption of correctness and sufficiency of evidence to sustain the findings of the Referee:

In Re Farmers' Dairy Asso.,
234 Fed. 118, 240 Fed. 121;

Chambers vs. *Continental Trust Co.*,
235 Fed. 441, 239 Fed. 1020;

McCullough vs. *Davenport Sav. Bank*, 226 Fed. 309.

Inherent in this presumption is the finding that petitioner's claim is not founded upon a real debt and is without merit; that debtor was not indebted to him at the time judgment was rendered; that his purported cause of action for fraud and conversion was fictitious and that his judgment was obtained by fraud and upon perjured testimony. Shall a claim based upon such a judgment be permitted to participate in the distribution of assets by a Bankruptcy Court?

It must be borne in mind that respondents are not seeking to vacate and set aside the judgment in the bankruptcy

proceeding. Their attack is directed at petitioner's claim. If his claim is disallowed the judgment still remains in force. Being based upon fraud and conversion there may be some question as to whether it can be discharged in bankruptcy. The order of the Referee disallowed petitioner's claim. It did not purport to disturb his judgment. The order of the District Court allows his claim—not his judgment. There is a vital distinction here.

Petitioner's judgment is not protected by the Full Faith and Credit Clause of the Federal Constitution. *Baldwin* vs. *Iowa State Traveling Men's Association*, 283 U. S. 522, 75 L. Ed. 1244.

Rules of State Courts and decisions of State Appellate Courts subversive of the general purpose of the Bankruptcy Act are not controlling upon Federal Courts. *Local Loan Co.* vs. *Hunt*, 292 U. S. 234, 78 L. Ed. 1231.

Respondents therefore respectfully submit that the Bankruptcy Court is clothed with power and authority to inquire into any judgment underlying a claim filed in bankruptcy for the purposes of determining whether the judgment represents a real debt and thus, whether the claim is meritorious and should be (1) allowed in whole or in part, (2) disallowed, or (3) subordinated to the claims of other creditors and that that power was rightfully exercised in this case.

Point II.

A court of equity has jurisdiction to tie the hands of a wrong doing judgment creditor so as to prevent him from profiting by his wrong.

By their objections to the claim of petitioner and the evidence which they introduced in support of their objections before the Referee in Bankruptcy, the respondents endeavored to and did invoke the doctrine of *Boring* vs. *Ott*, 138 Wis. 260, 119 N. W. 865. That was an action to enjoin the collection of a judgment upon the ground that the judgment was obtained by fraudulent representations and concealment. The Court held that such an action would lie and that a Court of equity has jurisdiction to relieve against a judgment contrary to equity and will restrain the execution of a judgment at law obtained by perjury of the successful party. This doctrine has application here:

U. S. vs. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93;

Marshall vs. *Holmes*, 141 U. S. 589, 35 L. Ed. 870;

Hazel-Atlas Glass Co. vs. *Hartford-Empire Co.*, 322 U. S. 237, 88 L. Ed. 1250;

Mercoid Corp. vs. *Mid-Continent Invest. Co.*, 320 U. S. 661, 88 L. Ed. 376;

Keystone Driller Co. vs. *General Excavator Co.*, 290 U. S. 240, 78 L. Ed. 293;

Publicker vs. *Shallcross, et al*, 106 Fed. 2d 949 (3rd Cir.);

Munro vs. *Callahan*, 55 Neb. 75, 75 N. W. 151;

El Reno Mutual Fire Ins. Co. vs. *Sutton*, 41 Okla. 297, 137 Pac. 700;

McBride vs. *Cowen*, 216 Pac. 104 (Okla.);

Vacuum Oil Co. vs. *Brett*, 294 Pac. 638 (Okla.);

Freese vs. *Hummel*, 37 Pac. 458 (Ore.);

Donovan vs. *Miller*, 88 Pac. 82 (Idaho);

Elkhorn Valley Bank vs. *Marley*, 85 N. W. 846 (Neb.);

Wirth vs. *Weigand*, 122 N. W. 714 (Neb.).

Herein the respondents seek the aid of equity to prevent the petitioner from enjoying the benefits of his ill-gotten judgment. They do not seek to set aside the judgment, nor to destroy it, but to prevent the petitioner personally from realizing upon the judgment. The disallowance of his claim does not affect his judgment. It still remains in force unless discharged by bankruptcy, but the disallowance does prevent him from enjoying the benefits of a judgment obtained by perjury, which is not founded upon a real debt and is without merit.

Point III.

The proceedings on behalf of the Trustee in the California District Court and Ninth Circuit Court of Appeals are not res judicata of the objections urged to petitioner's claim before the Referee in Bankruptcy and did not bar or estop the Bankruptcy Court from exercising its equitable jurisdiction and powers herein.

Petitioner contends that the proceedings on behalf of the Trustee in the California Courts amounts to an adjudication on the merits of the objections urged to petitioner's claim and that by reason thereof respondents were estopped

under the doctrine of res judicata from urging their objections to petitioner's claim before the Referee in Bankruptcy.

In response to this contention respondents say:

(a) The proceedings by the Trustee in the California Courts did not adjudicate the objections urged to the claim of the petitioner before the Referee in Bankruptcy and which were sustained by the Referee in Bankruptcy, to-wit: That the judgment was obtained by perjured testimony, does not represent a real debt and is without merit, for which reasons the claim of the petitioner in Bankruptcy was disallowed.

(b) The proceedings on behalf of the Trustee in the California Courts, whatever their effect, are not binding upon the creditors as objectors to petitioner's claim.

(A)

The proceedings by the Trustee in the California Courts did not adjudicate the objections urged to the claim of the petitioner before the Referee in Bankruptcy and which were sustained by the Referee in Bankruptcy, to-wit: That the judgment was obtained by perjured testimony, does not represent a real debt and is without merit, for which reasons, the claim of the petitioner in Bankruptcy was disallowed.

The Proceedings in the California District Court

(1) The Trustee filed an application or a motion for permission to intervene in the action in the California District Court in which the judgment was rendered, so that he could then move to vacate the judgment and be permitted to file an answer going to the merits of the cause of action set up in the complaint in the case in which the judgment was rendered. He was denied this request. In other words, he was never permitted to intervene in the California case and was never a party to the proceedings out there. Therefore, no order or judgment which was entered in the case upon his motion could be binding upon him because he was never a party to that litigation. The Ninth Circuit Court so held. See p. 15, appendix, petitioner's brief.

(2) No judgment was entered in the proceeding in the California Court upon the motion of the Trustee for permission to intervene so that he could move to vacate the judgment and file an answer setting up a defense to the cause of action set up in petitioner's complaint in the District Court of California. It is well settled that before an order or decision of a court of record can be made the basis of a plea of res judicata, that order or decision must be reduced to judgment in which is set out the matters which were determined by the Court, and the decision of the Court on such matters.

Spencer Smith vs. *Hamilton J. McCool*, 21 L. Ed. 324;

D.L. Flack and Son vs. *West Virginia Coal Company*, 46 Fed. 2d, 177, affirmed 50 Fed. 2d 1075;

Lynch vs. *City of Butte*, 43 Pac. 2d 652;

In Re Lauderdale's Estate, 269 NYS 229;

Samuel vs. *Public Natl. Bank & Trust Company of N. Y.*, 270 N. Y. Sup. 112.

In connection with this matter respondents respectfully call the Court's attention to the proceedings which were had before the California District Court on behalf of the Trustee and to the decision or order of the District Court thereon (R. Vol. 1, p. 275, p. 286, Vol 1, p. 303 (Objectors Exhibit 4) and p. 333, Vol. 2, p. 987, p. 1012). Here it will be seen that the only order or judgment entered in the case is the Clerk's minutes (R. Vol. 1, p. 285), showing that the motion of the trustee for permission to intervene, etc., was denied. The proceedings at page 987-1012, Vol. 2, being from the reporter's transcript. The minute order at Vol. 1, page 285, and upon which petitioner predicates his plea of res judicata, as respects the action of the Trustee in the California Court, can not be said to rise to the dignity of a judgment upon which such a plea can be based. The Ninth Circuit Court of Appeals recognized it as an order and not a judgment.

(3) The issues upon which the Referee in Bankruptcy disallowed petitioner's claim were not raised, urged, heard, adjudicated by the California District Court upon the motion of the trustee.

Respondents have made reference herein to the proceedings had in California District Court upon the motion of the Trustee for permission to intervene, etc. It is shown by the affidavit of Mr. Cobb, by reporter's transcript of the proceedings and also by the deposition of Mr. Cobb (R. Vol. 2, p. 655) that the Trustee was not permitted to intervene in the action and no evidence was heard by the Court and that the only thing that the Court considered was the argument on behalf of the Trustee for permission to intervene; that counsel for the Trustee was not permitted to finish his argument by the Court, but it is shown by the Clerk's Minutes (R. Vol. 1, p. 285), after the argument had proceeded for less than an hour the Court denied the Trustee's motion.

The rule of estoppel by judgment is stated in the first head-note of *Russell* vs. *Place et al*, 94 U. S. 606, 24 L. Ed. 214.

Also see:

De Sollar vs. *Hauseombe*,
158 U. S. 216, 39 L. Ed. 956;
Williams vs. *MacDonald et al*,
180 Cal. 546, 182 Pac. 29;
Molen vs. *Bussi et al* (Cal.), 5 Pac. 2d 450;
In Re Powers (7th Cir.), 115 Fed. 2d 69;
St. Louis Southwestern Ry. Co. vs. *Bolinger & Co.*
(5th Cir.), 17 Fed. 2d 924;
Aetna Life Ins. Co. vs. *Eaton*
(2nd Cir.), 43 Fed. 2d 711;
Passailaigue vs. *Herron et al*
(5th Cir.), 38 Fed. 2d 775.

For the purpose of determining what proceedings were had in the California Court this Court will examine the pleadings and other documents prepared and filed in the case, the stenographic reports of the proceedings, including any evidence which may have been submitted, the statement of the Judge and his rulings and findings and the judgment of the Court. 34 C. J. Sec. 1518 (b) p. 1074.

The respondents brought before the Referee and there is in the record, references to which have been made, all of the proceedings had before the California court on the motion of the Trustee. An examination of these proceedings by this Court will determine that there was no adjudication there of any of the questions or objections raised to the allowance of the claim of the petitioner in the Bankruptcy Court. Judge Bratton so found in the majority opinion of the Circuit Court of Appeals, reference to which is made in our statement of the case.

(4) The proceedings on behalf of the Trustee was brought under Rule 60-B of the Federal Rules of Civil Procedure and Section 473 of the California Code of Civil Procedure which is as follows:

> "Relief from judgment taken by mistake, etc. The Court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the

application shall not be granted, and must be made within a reasonable time, and in no case exceeding six months, after such judgment, order or proceeding was taken."

A proceeding under this section is no bar to a subsequent action to set aside the judgment:

Estudillo et al vs. *Security Loan & Trust Co. of So. Cal.*, 87 Pac. 19;

Antonsen vs. *Pacific Container Co.*, 120 Pac. 2d 148;

Resnick vs. *Parryzek*, 154 N. E. 350, 34 C. J. 387;

Hammond Lumber Co. vs. *Gilkey*, 7 Pac. 2d 724 (Cal.);

Nuckolls vs. *Bank of Cal.*, 74 Pac. 2d 264 (Cal.).

Rule 60 B was taken from the above quoted section of the California Code. *U. S. for use of Kantor* vs. *Mutual Const. Co.*, 3 F. R. D. 227.

(5) A decision or order of a Court denying a motion for leave to intervene and to vacate a judgment and permit answer to be filed is not res judicata of a subsequent contest between the same parties to disallow a claim in bankruptcy based on the judment on the grounds that the judgment was obtained by perjured testimony, is without merit and does not represent a real debt. Especially is this true where the subsequent action is, as a matter of fact, not between the same parties, but arises upon objections filed by creditors to a claim in Bankruptcy by the plaintiff in the prior action which claim is based upon the judgment obtained in such action by the plaintiff therein and to which

action the creditors were never parties. 34 C. J. Section 597, page 387, Notes 26 and 27.

(B)

The proceedings on behalf of the Trustee in the California Courts, whatever their effect, are not binding upon the creditors as objectors to petitioner's claim.

Respondents urge upon this Court that the rule of res judicata cannot be applied here, even if the other objections to the efficacy of the order of the District Court of California upon the motion of the Trustee be held of no merit, because that proceeding was one in which the Trustee by direction of the Referee in Bankruptcy moved for permission to intervene so that he could then move to vacate the judgment underlying petitioner's claim. After the California proceedings were concluded the Bankrupt filed a petition for an arrangement under Section XI of the Bankruptcy Act, and on August 26, 1940, the Referee entered an order staying the proceedings in bankruptcy and permitting creditors to contest each other's claims (R. Vol. 1, p. 29-31). Thereafter the creditors of the Bankrupt, some of whose claims had been allowed without contest, filed their objections to the allowance of the Heiser claim, and for the first time there raised the charges that the petitioner's judgment was obtained by perjured testimony; that it did not represent a real debt, and was without merit. The order staying the proceedings in bankruptcy, specifically provides in paragraph 5 on page 31 of Volume 1 of the record,

that the contests should be between the creditors and that they should bear their own expenses, including attorneys fees, and that in no event should the bankrupt estate be bound or liable therefor. Based upon this order, the respondents proceeded to the introduction of evidence to substantiate their charges against the claim of petitioner and which evidence the Referee in Bankruptcy found sufficient to compel him to deny the claim in full. Two important distinctions thus are present, one is that in the hearing before the Referee in Bankruptcy of the objections to petitioner's claim, the parties were not the same. The Trustee was not a party, nor were these respondents bound by what the Trustee had previously done in the California Court for the very important reason that in the California Court the Trustee sought permission to intervene in that action and become a party to it, so that he could attack petitioner's judgment, while in the proceedings before the Referee in Bankruptcy these respondents objected to and attacked petitioner's claim. And their attack, at least in part, was based upon different grounds than those urged by the Trustee in his unsuccessful effort to get into the California case. The second important distinction is this: If respondents are bound by the acts of the Trustee and if he be held to have become a party to the case in the California District Court, and if his acts therein be held to have been an adjudication upon the merits of the grounds advanced by him in his efforts to intervene, vacate the judgment and file an

answer and if a judgment sufficient to support a plea of res judicata be held to have been entered therein, nevertheless, respondents cannot be held bound thereby for the reason, in addition to those urged, that in the California Court the attack was upon the judgment, while before the Bankruptcy Court these respondents attacked and objected to petitioner's claim, under the order of August 26, 1940, upon the grounds that it was without merit and did not represent a real debt.

No such identity of parties and of issues obtained as is required to sustain a plea of res judicata and to estop the respondents from urging their objections to petitioner's claim. *Russell* vs. *Place, et al,* supra.

THE APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS

The Trustee appealed to the Ninth Circuit Court of Appeals from the order denying his motion. The grounds upon which he sought a reversal are stated on pages 1014 and 1016 of Volume 2 of the record; those of petitioner in opposition on page 1015. Petitioner contended that "the orders appealed from are not appealable orders." Upon authority of *Stevirmac Oil & Gas Co.* vs. *Dittman,* 62 L. Ed. 248, 210 U. S. 214, the Court held the order denying Trustee's and bankrupt's motion to be such as would sustain an appeal. And for this purpose held that the Trustee and bankrupt had in effect instituted an independent action

in the District Court. But this holding, in order that the appeal could be considered by the Circuit Court, did not change the nature of the proceedings nor the order entered nor the fact that the issues upon which the Referee denied petitioner's claim were not urged, heard nor adjudicated by the District Court. The same situation existed in *Pepper* vs. *Litton*, supra, except that there the Trustee actually instituted an independent and separate action to vacate the judgment which was decided against him and affirmed against him on appeal. Subsequently he objected to the claim based upon the judgment before the Referee and this Court held that the fact that the Trustee had gone into the State Court, had filed an independent and separate action to vacate the judgment which was decided against him, had appealed to the Supreme Court of the State, which affirmed the judgment of the State District Court denying his petition to vacate the judgment, did not prevent the Referee from hearing his objections upon the ground that the judgment was obtained by intrinsic fraud, did not represent a real debt and was without merit, and did not prevent the Trustee from urging such objections to the claim on the ground that his objections were barred and estopped under the doctrine of res judicata. We have the same identical situation here. This Court held in *Pepper* vs. *Litton*, supra, that the merits of the objections to the claim were not adjudicated in the State Court proceedings and for that reason there was no judgment to support a plea of res

judicata. Here, the merits of the objections to the petitioner's claim were not urged in, heard or adjudicated by the California District Court or the Ninth Circuit Court of Appeals and there is no judgment on the merits such as is required to support a plea of res judicata.

As a matter of fact the Ninth Circuit Court of Appeals apparently only considered the appeal as respects the bankrupt and not as respects the Trustee. This would seem to be the case when we consider that the only question which that Court actually passed on was whether there had been valid service of process. As respects the charge of fraud (the only charge being made was that of fraud in the entry of the judgment--not fraud in its procurement and perjury) that Court said the charge was denied and not proved and apparently abandoned. As a matter of fact there was no issue made on this charge in the District Court as the record here shows, no evidence heard and no decision by the lower Court. If the Circuit Court considered the charge made, it was correct in the finding that it was abandoned. With respect to this feature of the matter, the Tenth Circuit Court of Appeals, in the majority opinion correctly stated: "But the nature of the fraud referred to does not appear. And the record before us does not contain any showing that the contention that the material allegations in the complaint were knowingly false, that the judgment was secured through the use of perjured testimony given by Heiser, and that a fraud thus was committed on the

Court and the parties was ever submitted to the Court in California by motion to vacate the judgment or otherwise, or that such issues were ever expressly adjudicated by that Court in favor of Heiser." Again we say the Tenth Circuit Court of Appeals is correct. The record supports this finding and conclusion by that Honorable Court. There is nothing in the record to support petitioner's statements to the contrary. Apparently realizing this, petitioner, on page 32 of his brief, quotes from the contents of a statement filed by the bankrupt with the Referee. Surely such a statement cannot form the basis for the well-grounded plea of res judicata to which petitioner refers. The fact that petitioner seeks to rely on this statement, filed in the Bankruptcy Court, before Trustee's motion was filed in the California District Court, and in which statement bankrupt sought no relief and upon which he was granted no relief, would indicate a lack of confidence in his position with reference to the matters urged, heard and decided by the California courts.

Again apparently realizing that the record and the facts in the case support the decision of the Tenth Circuit Court of Appeals and that the matters and things upon which the Referee disallowed petitioner's claim were not, as found by the Tenth Circuit Court of Appeals, urged, heard nor decided by either Court in California, petitioner, under B on page 19 of his brief and again on page 34, seeks to have this Court hold the order of the California District Court,

affirmed on appeal, res judicata as to the matters and things not urged before or decided by the California Court, but upon which the Referee disallowed petitioner's claim, under the theory that the order is res judicata not only as to the matters which were there decided but as to all matters which might have been litigated therein. This doctrine does not apply in this Court and especially in a case like this. *United Shoe Machinery Corporation, et al* vs. *United States of America*, 258 U. S. 451, 66 L. Ed. 708; *Chris Larsen* vs. *Northland Transportation Company*, 292 U. S. 20, 78 L. Ed. 1096.

But if such a rule has application in matters of this kind, it can have no force in this case for the reason that it is apparent from the opinion of the Ninth Circuit Court of Appeals, affirming the order denying petitioner's motion, that that Court considered the appeal only as to the bankrupt and not the Trustee, for that Court said in its opinion that the Trustee could not have had a defense to the petitioner's original cause of action because he was not a party to that suit. Further than this, the truth of matters set up in a tendered answer, are not in issue and cannot be litigated upon hearing of motion to vacate judgment. The evidence which respondents introduced before the Referee in support of their objections to petitioner's claim was not proper, competent nor admissible upon the hearing of Trustee's motion to vacate the judgment. Those were matters set up in the proffered answer and which Trustee

contended he could prove if the Court permitted him to intervene, be made a party to the litigation and be given an opportunity to present evidence going to the merits of the matter. But, all this he was denied. And the Circuit Court of Appeals says that this the Trustee was properly denied because he was not a party to the litigation.

There is the further answer to this contention and that is the doctrine enunciated in *Pepper* vs. *Litton*, supra, and followed many, many times that the bankruptcy court, being a Court of equity, looks to the substance and not to form; does not permit technical considerations, as here contended for, to prevent the due and proper administration of justice.

There is the further contention advanced by petitioner, repeated many times, that the decision of the Tenth Circuit Court of Appeals herein, is in conflict with the decision of the Ninth Circuit Court of Appeals affirming the order of the District Court denying the Trustee's motion for leave to intervene, etc. This upon the theory, first, that the Ninth Circuit Court of Appeals, for the purposes of appeal, held that the Trustee's action amounted to an independent action; and second, that, even though the issues upon which the Referee decided the matter were not urged, heard nor decided by the California Court, nevertheless, under the rule above referred to, the order denying Trustee permission to intervene, etc., will be held conclusive not only as to all matters which were litigated but which might have been litigated. We have answered this proposition. The

Trustee was not a party to the California litigation—the Ninth Circuit Court so held; the only issue decided by that Court was the validity of the summons; the issues upon which the Referee decided against petitioner were not and could not have been urged, heard, litigated and adjudicated in the proceedings in the California Court. There is the further reason why this contention of the petitioner can not be sustained. In the California Court, the Trustee was seeking permission to intervene so he could file an answer attacking petitioner's judgment, while in the Bankruptcy Court and as decided by the Tenth Circuit Court of Appeals, the matters there arose upon respondents' objections to petitioner's claim in bankruptcy—two distinct, separate matters, proceedings, claims and adjudications.

The doctrine of *In Re James A. Brady Foundry,* supra, *Pepper* vs. *Litton,* supra, and *In Re Powers,* 114 Fed. 2d 69 (7th Cir.), has particular application here. These cases demonstrate the soundness of respondents' contention that the order of the California District Court upon the motion of the Trustee and the decision of the Ninth Circuit Court of Appeals affirming such order, cannot form the basis of a well-grounded plea of res judicata in this case. And the principal reason this is so is that the merits of the objections to the petitioner's claim were not inquired into, were not heard, were not urged before and were not decided by the California Court and there had been no adjudication upon the merits of this controversy by any court prior to the time that the Referee in Bankruptcy entered the order denying petitioner's claim.

Point IV.

By acquiescing in the order of August 26, 1940, staying proceedings in bankruptcy; filing objections to claim and participating in hearings thereon before Referee in Bankruptcy, petitioner submitted to jurisdiction of Bankruptcy Court and is now estopped to question that jurisdiction.

By the order of August 26, 1940 (R. Vol. 1, p. 29-31), the Referee stayed proceedings in bankruptcy, permitted creditors to contest each other's claims; fixed time for filing contests and provided that such contests should be conducted by the creditors and at their expense. No appeal or writ of review was taken from this order. Petitioner contested claims of other creditors. *M. E. Heiser* vs. *Marguerite B. Woodruff, et al,* supra. He urged these objections and participated in the hearing of objections to his claim. Respondents submit that he should be estopped now from claiming that the Bankruptcy Court was without jurisdiction to hear the objections urged thereto. True, he objected at the time the matter came on for hearing but that was several months after the order of August 26, 1940, had become final and after he had failed to seek a review thereof. *Remington on Bankruptcy*, 3d Ed., Section 2351, Vol. 5.

Point V.

This case, being here for all purposes, respondents ask that the Court consider the evidence in support of respondents' objections to petitioner's claim for the purpose of determining whether the order of the Referee in Bankruptcy denying the claim is reasonably supported by competent evidence and should be affirmed.

Because this case is one invoking the jurisdiction of equity and because it has been pending for nearly seven years and should be disposed of, respondents labor in the hope that this Court will see fit to consider, not only the question of the power and jurisdiction of the Bankruptcy Court to entertain and hear the objections to the petitioner's claim, but also the evidence introduced by the respondents in support of their objections and which the Referee in Bankruptcy found sufficient to compel him to deny the claim in full.

A case here for one purpose is here for all purposes.

Donovan vs. *Pennsylvania Co.*,
199 U. S. 279, 50 L. Ed. 192;

Panama R. Co. vs. *Napier Shipping Co.*,
166 U. S. 280, 41 L. Ed. 1004;

Puerto Rico vs. *Havemeyer*,
296 U. S. 506, 80 L. Ed. 357;

Story Parchment Co. vs. *Paterson Parchment Paper Co.*, 282 U. S. 555, 75 L. Ed. 544.

As heretofore stated and supported by authorities, the order of the Referee disallowing petitioner's claim carries

with it a presumption of correctness and sufficiency of evidence to sustain the findings of Referee.

In Re Farmer's Dairy Asso., supra, *Chambers* vs. *Continental Trust Company*, supra; *McCullough* vs. *Davenport Savings Bank*, supra;

Upon review the findings of the Referee will not be disturbed if reasonably supported by the evidence. *Remington on Bankruptcy*, 3rd Ed., Vol. 8, Section 3669.

In support of their plea that this Court affirm the action of the Referee in disallowing petitioner's claim, respondents risk burdening the time of this Court and this brief with the following brief resume of the high points in the evidence which they submitted to the Referee to sustain their objections to petitioner's claim.

The first evidence which respondents were able to produce with reference to the plan and scheme of the petitioner is the deposition of John Greble Moran (R. Vol. 2, p. 658). Mr. Greble, a Los Angeles merchant, testified that in April or May of 1928 he met the petitioner at the witness' place of business. Witness had been asked to appraise some antique jewelry for Aimee Semple McPherson, which petitioner was selling Mrs. McPherson. Petitioner came to him and asked him to raise his appraised value of the jewelry and promised him a good cut on it. Notwithstanding the rejection of his offer by witness, petitioner returned a few days afterwards and sought to prevail upon witness to induce the Bankrupt to put up between twenty-five and

fifty thousand dollars to finance the petitioner in business and promised the witness 40% of whatever money he could get Woodruff to advance. He also endeavored to get witness to contact other men for the same purpose. Failing in this and apparently learning that Walter Calvin Smith was a friend of Woodruff, Heiser went to him and through Smith obtained an introduction to Woodruff. What transpired within the next few weeks, which was in the summer of 1928, is detailed in the testimony of the bankrupt (R. Vol. 1, p. 642); the testimony of his wife (R. Vol. 1, p. 619); the testimony of Herman Woodruff (R. Vol. 1, p. 625); the deposition of Gean Kosto (R. Vol. 2, p. 661), and the deposition of Howard Woodruff (R. Vol. 2, p. 662). This evidence shows that Smith, who was in the jewelry business, was indebted to Woodruff and that Heiser representing that he had certain industrial sapphires of the value of around $40,000.00 which he was willing to put into Smith's business, after numerous calls upon Woodruff and much insistence upon Heiser's part, prevailed upon Woodruff to loan a new corporation to be organized by Heiser and Smith, the sum of $10,000.00, upon the agreement that after the corporation was organized Heiser would go to Australia with Herman Woodruff, so that Herman Woodruff could inspect his mines in Australia for the purpose of determining whether the Bankrupt would be interested in advancing additional funds for development purposes. Instead of meeting Herman Woodruff in two weeks as planned, Heiser, respondents con-

tend, took the bankrupt's $10,000.00 and went to Europe, where he stayed for more than two years.

It is alleged in the complaint upon which the judgment was rendered, that the petitioner left the gems described in his complaint in the United States National Bank at Los Angeles with instructions to the bank to let Woodruff and Smith have these semi-precious stones when they called for them and that the arrangement between the parties was that the more valuable stones were to be sold for Heiser's account by Woodruff and Smith and the money realized from the sale of these stones placed to Heiser's credit in the bank. (J. A. Seelye, the trust officer of the bank, testified that this material was placed in the bank in the name of Heiser; that no one else had access to it and that none of it was taken out by Woodruff or Smith; that Heiser wanted to place a value on it and wanted the bank to give him a certificate as to value, but that the material looked like country rock to him and he would not place a value on it without it being appraised; that Heiser would not have it appraised (R. Vol. 2, p. 652-5)).

The first communication from Heiser after he went to Europe is the letter shown at (R. Vol. 1, p. 301). It will be noted that the petitioner in this letter makes no inquiry of Smith with reference to the properties which he claims to have left in the bank.

Before going to Europe and as a part of his arrangement with Smith, Heiser organized the Golden State Gem

Company of Nevada, a $5,000,000 corporation. He then authored the prospectus shown at page 297 of Volume 1 of the record. In his letter at page 301 of the record he makes reference to the stock in this company and to its sale and to his teddy bears, but no reference whatever to $164,000.00 worth of gems which he had left in charge of Woodruff and Smith, two men whom he had known less than 60 days.

Petitioner alleged in his complaint that he was in Europe trying to sell the gems which were to be cut and produced by the Golden State Gem Company, but the letter at page 318 of Volume 1 of the record written from Europe would seem to disprove this contention.

The material which petitioner shipped to Los Angeles in pursuance of his agreement with Woodruff and Smith and which was placed in the bank there is the same material shown in the bill of lading at (R. Vol. 2, p. 1117) and valued at $500.00.

In September, 1929, the Golden State Gem Company went into bankruptcy, the petitioner was still in Europe. He had his brother-in-law, E. A. Lobree, file a claim for him for this same material in the bankruptcy matter and the material was then valued at $30,250. The claim was filed by Lobree under power of attorney from the petitioner, and Lobree testified that petitioner was the only source of information he had with respect to the character and value of the gems he claimed to have lost (R. Vol. 2, p. 677). This claim was denied (R. Vol. 2, p. 1187).

Prior to the institution of this bankruptcy proceedings the petitioner had testified in three different matters in California respecting the source, possession, character, quality and value of the material which he claimed to have shipped from San Francisco to Los Angeles and stored in the bank there and which he says the bankrupt and others subsequently converted and for which he obtained judgment. Respondents produced transcripts of this testimony, all of which was received in evidence.

In his testimony upon the hearing to determine value given in June, 1939, before the California District Court, petitioner testified that the material for which he obtained judgment was shipped to the Panama-Pacific Exposition at San Francisco in 1914 by the Queensland Government; that it was his property; he loaned it to that government for exhibition at the exposition; he was in charge of the exhibit for the Queensland Government and after the exposition closed he kept his property in the United States, stored it in the Wells Fargo Nevada Bank Safe Deposit Department, in San Francisco, where it remained from 1915 to 1928 (R. Vol. 2, p. 1129-33 and 1153). He repeated this testimony as to the source of this material in his deposition taken by the respondents (R. Vol. 2, p. 755-9). Also in exhibit A, page 1171 of the record. Introduced R. Vol. 1, p. 638.

By the depositions of D. B. Edward, executive secretary of the Australian government commission to the Panama-

Pacific International Exposition (R. Vol. 2, p. 957), the deposition of A. A. Staines, under-secretary, Department of Mines of Queensland government (R. Vol. 2, p. 964), and the deposition of Leo. J. Jones, Government geologist and representative of the State government of New South Wales at the exposition and the exhibits attached thereto (R. Vol. 2, p. 976), it is shown that petitioner had no connection with the Panama-Pacific Exposition so far as the governments of Australia or Queensland were concerned; that he did not loan any gems or other material to those Governments for exhibition; that he received permission to erect and operate a lapidist's bench within the Mineral Court of the Australian Pavilion 8 x 4 feet, from which he was ousted after about a week's time because he violated the rules of the Exposition; that he had no sapphires or other gems on exhibit there and the Governments exhibited no such minerals belonging to him.

The answer to interrogatory number 3 on page 965 of Volume 2 of the record, from the official records of the Queensland government shows the total gem exhibit at the Exposition by that Government to have been approximately 150 oz. of a total value of approximately 1000 pounds or $5000.00 against petitioner's fantastic claim of approximately 40,000 ounces of a value of $164,000.00. The values of $8 to $15 per ounce shown on pages 968-73 of Volume 2 of the record contrast with his fantastic values of $40, $50 and $60 an ounce for the same kind of material.

By the deposition of D. K. Stern (R. Vol. 2, p. 669), it was shown that petitioner had no deposit of the kind claimed by him in the Wells Fargo Bank & Trust Company or the Wells Fargo Nevada National Bank in San Francisco at any time between 1915 and 1928.

By the deposition of the brother-in-law Lobree, taken by creditors (R. Vol. 2, p. 677), it was shown that petitioner was buying and selling sapphires and other minerals from 1915 to 1928; making trips back and forth to Australia to get this type of merchandise. (During this time petitioner claimed he had approximately 40,000 ounces or more than 3300 pounds, jeweler's weight, of the same kind of merchandise, being the material for which he obtained judgment, in storage in the San Francisco bank).

By the petitioner's own testimony, the material which he claimed he possessed was a strategic war material. He was a subject of Great Britain, living in the United States and despite the fact that this type of material was a critical war need from 1914 to 1919 (R. Vol. 2, p. 1160), he kept it locked up in the bank while at the same time he was selling this type of material to Germany during the first world war. In other words, trading with the enemy. While this claimed material was allegedly in the bank at San Francisco, and just a year prior to the time that he claimed it was shipped to Los Angeles, he wrote the letter shown at page 933 of Volume 2 of the record. There he was trying to borrow $6000.00 from a feeble old woman for the purpose

of organizing a stock company to raise money to mine sapphires and other minerals to supply what he claimed was then an unsatisfied market demand. At the time he wrote this letter he claims to have had $164,000.00 worth of this material in the bank in San Francisco; material of a staple value and easily salable and upon which he could easily have realized its value.

In the bill of lading this property was valued at $500.00. In the petitioner's claim in California Bankruptcy Court it was valued at $30,250.00. This claim was filed on September 20, 1930. Petitioner testified in support of the claim in April, 1932. He then claimed that he had 30,000 ounces of industrial sapphires valued at $1.00 an ounce or $30,000.00 (which was the amount of his claim), 1000 ounces of assorted sapphires valued at $40.00 an ounce or a total of $40,000.00, 1200 ounces of opals valued at $15.00 an ounce or a total of $18,000.00, 1000 ounces of zircons valued at $10.00 an ounce or $10,000.00, one piece of jade valued at $1000.00, a total of 33,200 ounces of minerals and one piece of jade, at a total value of $99,000.00, of all of which he had been deprived.

In his verified complaint in case 5587 J, filed May 11, 1932, which was less than thirty days after he testified in the Bankruptcy Court, he listed 35,000 ounces of industrial sapphires instead of 30,000 ounces, 4400 ounces of other sapphires, opals and zircons and one piece of jade 28 pounds, being a total of 39,400 ounces, one piece of jade,

which he valued at more than $160,000.00, as against 33,200 ounces and one piece of jade of the value of $99,000.00, one month previous to that time (R. Vol. 2, p. 1040).

In October, 1932, some five months after case 5587 J was filed and six months after he testified in the California Bankruptcy Court, his deposition was taken in the case of *Heiser* vs. *Graves*, No. 238-348, Superior Court at San Francisco (R. Vol. 2, p. 1072). This property was brought into question there. He identified it at that time as to quantity and quality as 40,000 ounces of sapphires, 1200 ounces best blue sapphires, 1200 ounces of opals, 1000 ounces of star sapphires, 1000 ounces of zircons—a total of 44,400 ounces (R. Vol. 2, p. 1079). It will be noted that in his testimony in the California bankruptcy matter and in his complaint in 5587 J he made no mention of the 1200 ounces best blue sapphires about which he testified in the Graves case.

In the hearing before the California District Court to determine value held in June, 1939, he testified he had 35,000 ounces of mechanical industrial rough sapphires, valued from 80 cents to $1.36 per ounce which, at an average of $1.08 per ounce, would be $37,800.00; 1200 ounces of blue sapphires which had risen in price to $60.00 an ounce, $72,000.00; 1000 ounces of star sapphires which had risen to $50.00 an ounce or $50,000.00; 1200 ounces of opals at $15.00 an ounce, $18,000.00; 1000 ounces of zircons at $10.00 an ounce, $10,000.00, and one piece of jade now worth from $1000.00 to $5000.00 or an average of $3000.00—a total value

of $190,800.00. It should be borne in mind that all of these quantities and vaules were fixed as of between August, 1928, and May, 1929, the time of the alleged conversion.

In these four instances the petitioner made oath to having four different quantities, four different qualities, of four different values. He had no records or books or evidence of any kind or character to show his ownership or possession of any of this property, except the bill of lading which was introduced in evidence by the creditors. He did not appear at any of the numerous hearings in this matter in the Oklahoma courts.

When the petitioner's deposition was taken by the creditors, at considerable expense to them (R. Vol. 2, p. 727-958), he would not appear before the notary to examine his deposition for the purpose of ascertaining whether any corrections should be made in it and to sign it. At pages 915 to 923, inclusive, Volume 2 of the record, are shown the proceedings incident to the futile endeavor of the notary to get the petitioner to check over his deposition and sign it.

Attached to petitioner's deposition are 10 documents bearing his signature (R. Vol. 2, p. 933-951). In the taking of his deposition he refused to identify his signature on any of these instruments and it became necessary for respondents to hire a handwriting expert to prove their genuineness (R. Vol. 1, p. 630). Among the exhibits thus introduced were a number of certificates of stock in the Golden State Gem Company of Nevada, issued to petitioner and

which were issued to him in payment of the material which he shipped to Los Angeles and in which transaction he transferred title to this material to the Golden State Gem Company of Nevada.

This is just a brief resume of the more important facts established by respondents in support of their objections to petitioner's claim. All of the evidence covers several hundred pages of the record. So much we have referred to for the purpose of establishing that the order of the Referee disallowing petitioner's claim is reasonably supported by competent evidence, all of which was undisputed and undenied. And upon this evidence respondents ask this Court to affirm the order of the Referee in Bankruptcy disallowing petitioner's claim so that this matter may be concluded at an early date.

CONCLUSION.

Petitioner's attack upon the doctrine of *Boynton* vs. *Ball* and *Pepper* vs. *Litton*, supra, is evidently an attempt to get this Court to overrule these authorities and the doctrine upon which they are based—the doctrine that a Bankruptcy Court has full power to inquire into the validity of any claim asserted against the estate and to disallow it if it is ascertained to be without lawful existence. To do this the Court would have to overrule not only the above authorities but also *Lesser* vs. *Gray*, *Prudence Realization Corporation* vs. *Giesl*, *U. S. F. & G. Co.* vs. *Bray*, supra, and

others. No particular reason is advanced why this should be done. The argument which seeks it is based upon the theory that res judicata is a doctrine without exception and is sacrosanct. But such is not the case. While it is a doctrine of peace, it is not to be applied to the denial of justice, to deprive one of a just defense or to close the Courts to all inquiry into the truth. Nor where there has been no adjudication of the controversy upon its merits. *Russell* vs. *Place*, supra; *Mercoid Corporation* vs. *Mid-Continent Investment Company*, supra; *Hazel-Atlas Glass Company* vs. *Hartford-Empire Company*, supra. The proper administration of the Bankruptcy Act is clothed with a public interest. The estate is in the nature of a public trust and the Trustee is an officer of the Court.

The doctrine of the cases which petitioner seeks to avoid has been the law of this Court since 1887. It is a true interpretation and pronouncement of the intent and purpose of the Bankruptcy Act and of the practice of equity, by which the Courts are guided in enforcement of the Bankruptcy Act. No good reason is shown why this wholesome doctrine should now be abandoned nor why it should not apply in this case. Respondents say that here is a specific case for its application. Here, a number of creditors with allowed claims, with the right to share in the property of the Bankrupt as the claim of each is measured by the total assets of the Bankrupt estate, would be prejudiced and defeated by a claimant whose claim is not based upon a real

debt, is without merit and to whom Bankrupt was not and is not indebted. The basis of petitioner's claim thus to subvert the purposes of the Bankruptcy Act is that by default he obtained a judgment against Bankrupt representing the amount of his claim. To this respondents counter, that if the cause of action upon which petitioner obtained his judgment had been subjected to the light of truth and justice he would not have obtained his judgment and would have no claim. And when his claim was subjected to the light of truth and justice it was shown to the satisfaction of the Chancellor on the Bench that his claim was not based on truth and justice, that the Bankrupt was not indebted to him; that his claim was without merit and that the judgment upon which his claim is based was obtained by the use of perjured testimony.

The facts in this case are in accord with *Pepper* vs. *Litton*, supra. Almost the same situations exist with reference to proceedings before and after bankruptcy. There the judgment creditor would have had his claim allowed under the doctrine of res judicata because the Trustee had instituted an independent and separate action in the State Court to vacate and set aside his judgment and was unsuccessful in doing so. But there this Court said "no" because the merits of the objections to the claim were not inquired into, heard nor adjudicated in the State Court proceedings. The same is true here as found by the Tenth Circuit Court of Appeals and as respondents have demon-

strated in their brief. Until the Referee in Bankruptcy heard the objections to petitioner's claim and the evidence in support thereof, which is contained in approximately 800 pages of the record, in no Court had the merits of the cause of action upon which petitioner's judgment is based been attacked on the grounds that at the time of the rendition of the judgment Woodruff was not indebted to Heiser in any amount; that the material allegations contained in the complaint were untrue; that the judgment was obtained through the use of perjured testimony given by Heiser and that he thus committed a fraud upon the Court and the parties. This proof was made before the Referee not in an attack upon petitioner's judgment but in opposition to the allowance of his claim in bankruptcy upon the theory and for the purpose of showing that his claim is not based upon a real debt and is without merit These matters were not adjudicated before by any Court.

We have emphasized that the proceedings before the Referee were initiated upon the claim of petitioner; the objection there urged and heard were to his claim. The disallowance of his claim does not affect his judgment. It still remains of record and in force, unless discharged in bankruptcy. Being based upon fraud and conversion there may be some question as to whether bankruptcy can discharge it.

In the proceedings before the Referee the petitioner had every opportunity to prove and show the merits and worth

of his claim and that it is based upon a real debt. He could have done this without waiving or prejudicing his objections to the jurisdiction of the Referee in Bankruptcy (unless waived as contended under Point IV hereof). The hearings on the objections to the claim extended over a period of many months. At one time petitioner filed in the United States District Court for the Eastern District of Oklahoma his complaint seeking injunctive relief against the respondents proceeding with the hearings before the Referee (R. Vol. 2, p. 111). A temporary injunction was granted which was dissolved upon trial, the District Court finding that it had no jurisdiction to entertain the action (R. Vol. 2, p. 1230-5). Respondents do not know why the petitioner refused to introduce evidence in support of the merits of his claim, unless it be for the reasons he did not identify the ten documents which he signed and which were introduced upon the taking of his deposition (R. Vol. 2, p. 933-51), or the same reasons why he did not appear in any of the hearings in the Oklahoma Courts, or the same reason that he did not respond to the entreaties of the notary public who took his deposition to read it and sign it (R. Vol. 2, p. 915-924). But, be this as it may, the fact remains that he has had his day in Court and has failed to meet the demands of right and truth and justice. For these and the other reasons herein submitted respondents ask that this Court not only sustain the judgment of the Tenth Circuit Court of Appeals herein, but that it also affirm the action

of the Referee in Bankruptcy disallowing petitioner's claim so that this matter may be concluded at an early date.

All of which is most sincerely and most earnestly submitted.

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